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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

LORENA FAY OVERFIELD,

Petitioner,

v.

FRANCIS N. BONSIGNORE, MARSH AND MCLENNAN COMPANIES, WILLIAM M. MERCER, INC., WILLIAM M. MERCER OF KENTUCKY, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

LORENA FAY OVERFIELD
1236 West 62nd Street
Kansas City, Missouri 64113
816-822-1349

Petitioner pro se

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

89 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the grant of summary judgment and dismissal was proper in this ERISA disclosure action.

2. Whether decision is in conflict with fiduciary obligations holding of this Court in Howe v. Varity Corp., 41 F.3d 1263 and the remedial "catchall" provision therein.

3. Whether the decision is correct in permitting the issuance of a QDRO at the state court level to preempt federal ERISA law, allowing marital benefit asset division without verification and history of contributions in all entities.

4. Whether decision gives a participant a greater right than beneficiary to jointly owned marital benefits.

5. Whether the decision has left no remedy to recover or secure ERISA benefits when divorce occurs.

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PETITION FOR A WRIT OF CERTIORARI

Lorena Fay Overfield respectfully petitions the Court to issue a writ of certiorari to review the judgments and opinions of the United States Court of Appeals for the Eighth Circuit, issued on October 15, 1996 and December 4, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, No. 95-4050, is set out in Appendix A. The order denying petition for rehearing and suggestion for rehearing en banc is set out in Appendix B. The opinions of the United States District Court for the Western District of Missouri, No. 94-0991-CV-W-1, are set out in Appendix C.

JURISDICTION OF THE SUPREME COURT

The judgment and opinion of the United States Court of Appeals for the Eighth Circuit was entered on October 15, 1996. The order denying timely filed petition for rehearing and suggestion for rehearing en banc was entered December 4, 1996. This petition for a writ of certiorari is timely filed within 90 days of denial. Rule 13.3 of the United States Supreme Court. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

ERISA Pub.L. 93-406, 88 Stat. 829

The Retirement Equity Act of 1984 Pub.L. 98-397, 98 Stat. 1426

29 U.S.C. § 1002

29 U.S.C. § 1056

29 U.S.C. § 1132

29 U.S.C. § 1024

29 U.S.C. § 1025

29 U.S.C. § 1140

29 C.F.R. § 2520.102-3

STATEMENT OF THE CASE

Petitioner Lorena Fay Overfield brought this ERISA action to enforce disclosure rights as a beneficiary/alternate payee of pension and benefit plans accruing from 1961 in various names, sponsored by various entities through mergers and acquisitions, while the surviving corporate umbrella remained the single and only employer of her former husband, the plans participant.

The July 8, 1988 dissolution decree included the court awarded division of two then current plans of Respondent Marsh and McLennan Companies, under a Qualified Domestic Relations Order (QDRO), as provided by The Retirement Equity Act of 1984 which recognized joint martial ownership in ERISA protected plans. Disclosure

to substantiate her jointly owned assets was denied by Respondents before and after divorce, when repeated written and oral requests were made, by Petitioner and her then attorney, acting on her behalf during discovery period, and again following division to substantiate account values. A Release signed by her former husband as participant accompanied requests.

In 1994 her 1099R and computation of pension were found to be in error, additional requests for information were made and denied. Department of Labor publications made Petitioner aware of the right to bring action for ERISA violations.

The district court granted summary judgment in favor of Respondents Bonsignore, Marsh and McLennan Companies and William M. Mercer, Inc., and dismissed Respondent William M. Mercer of Kentucky, Inc., treated as summary judgment.

It was determined that only the plan administrator (after July 8, 1988 decree) Respondent Francis N. Bonsignore, designated by plan documents of the two plans awarded Petitioner, is the only proper defendant, and that no individual or entity other than the designated plan administrator may be sued for failure to disclose benefit information.

"Administrator" is defined by ERISA as follows:

> The term administrator means – (i) the person specifically so designated by the terms of the instrument under which the plan is operated; (ii) if an administrator is not so designated, the plan sponsor; or (iii) in the case of a plan for which an administrator is not designated and a

> plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe. U.S.C. § 1002(16)(A).

The district court found that Petitioner is entitled only to benefits from the two plans awarded under the QDRO and was not considered a beneficiary with standing to bring a claim until the QDRO was entered on July 8, 1988, which followed the analysis in *Stephen Allen Lynn, P.C. Employee Profit Sharing Plan and Trust v. Stephen Allen Lynn, P.C.*, 25 F.3d 280, 282 (5th Cir. 1994).

29 U.S.C. § 1132(c) grants liability when beneficiary, or participant, requests from plan administrator the information to which he or she is entitled and the plan administrator fails to comply with the request for at least 30 days. The district court found that the first relevant request made was dated April 1, 1994, App. at 15, and was determined to be non-specific as to be a request for the information set forth in other relevant ERISA sections which provide beneficiaries knowledge of benefit information.

The district court found that the Respondents tried to accommodate each request, that they did not act in bad faith and that no penalties would be imposed under Section 1132. It was determined that ERISA requires only specific disclosures set forth in Sections 1025(a) and 1024(b)(4).

It was determined that because Petitioner did not have standing as an ERISA "beneficiary" before July 8, 1988 she is not entitled to any benefit accrual information for the years before 1988, and that she is not entitled to

benefit accruals of one lump sum distribution in November, 1988, determined by July 8, 1988 QDRO.

The district court did not address discrepancy of breakdown of accrued benefits monthly payment and determined that because Respondents informed Petitioner of her benefits they have satisfied the requirements under Section 1025(a). It was found that information of benefit plans in the merged corporation from 1961 to 1984 was properly denied because Respondents are under no obligation to provide such information and that Petitioner has no standing to assert ERISA claims arising before July 8, 1988.

The breach of fiduciary duty alleged by Petitioner was disallowed stating that a plaintiff may only bring an ERISA claim for breach of fiduciary duty when the alleged breach "is one of duty to the plan itself.", contrary to *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994) (cert. granted March 19, 1996 Case No. 94-1471) 41 F.3d 1263.

It was determined that Petitioner had failed to produce facts that Respondent Bonsignore's alleged disclosure violations have caused her harm, offering no support that non-compliance was "arbitrary and capricious" and that an award of damages (presumably equitable relief) is inappropriate.

Respondent William M. Mercer of Ky., Inc. was dismissed, treated as summary judgment, in this entity created in 1975, a part of William M. Mercer (Delaware corporation) in 1983 before merger occurred in 1984. Petitioner's former husband was employed in 1961 in Kentucky with Mercer of Ky. entity personnel and other co-

major stockholders before acquisition in 1984 by Respondent William M. Mercer, Inc. (Delaware), a wholly owned subsidiary of Respondent Marsh and McLennan Companies.

The district court determined that Respondent Mercer of Ky. is not the plan administrator of the benefit plans at issue and not amenable to Petitioner's claims, that it is a shell corporation that has never had any employees and exists solely for the purpose of maintaining insurance brokerage and agency licenses in the State of Kentucky. This was asserted by affidavit, later refuted as erroneous by Petitioner and Secretary of State – Kentucky filings. It was determined by the district court that Respondent Mercer of Ky. had never sponsored or maintained any employee benefit plans. All pre-merger Kentucky obligations in this acquired firm were deemed to have been assumed by William M. Mercer, Inc. (Delaware corporation) and the designated administrator of the plans for that entity, Respondent Bonsignore. The district court statement that Petitioner did not dispute the designation of Mercer of Ky. as a shell corporation was clarified in letter as being erroneous and in the later motion for reconsideration. See App. G68, H70 and H72. It was concluded that Mercer of Ky. is not a proper party to this action.

An appeal filed in the United States Court of Appeals for the Eighth Circuit, No. 95-4050, affirmed the district court judgment. The petition for rehearing with suggestion for rehearing en banc was denied. Petitioner asserted on appeal that she had been deprived of her right to substantiate and recover her co-owned marital assets from 1961 which resulted in economic loss, that *Howe*,

supra, allowed beneficiaries to claim breach of fiduciary duty, require disclosure obligations that threaten interests, and the right to equitable relief.

> 29 U.S.C. § 1140 makes it "unlawful for any person to . . . discriminate against . . . a beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, (or) this subchapter."

It was asserted by Petitioner on appeal that the Release obtained from former husband participant by attorney on behalf of Petitioner was proper and timely to gather information prior to her divorce. It was her assertion that plan sponsors were "plan administrators" in the absence of designated name of person as plan administrator from 1961 in ERISA protected plans. She stated that ERISA is an all encompassing statute, interlocking and interdependent in its remedial scheme to protect employee benefits and that the "catchall" provision of ERISA should apply without a precise on point remedy to address issues in this case. It was her contention that this judgment is contrary to *Howe v. Varity* precedent. Petitioner documented the faulty affidavit of Mercer of Ky. claiming to be only a shell corporation with no employees. It was her contention that disclosure of all plans are granted under ERISA to promote equity, and equitable relief deemed proper is her right.

The basis for federal jurisdiction in the district court was The ERISA Statute 502(c) ERISA Pub.L. 93-406, 88 Stat. 829. The Retirement Equity Act of 1984 Pub.L. 98-397, 98 Stat. 1426.

REASONS FOR GRANTING THE WRIT

A

The Opinion of the Eighth Circuit is Contrary to the Opinion of this Court in Howe v. Varity Corp., 41 F.3d 1263 Which Clarifies Fiduciary Obligations and Provides Remedy

The district court found that fiduciary obligations were to the plan itself and that ERISA does not allow a claim for breach of fiduciary duty based on a plan administrator's failure to provide information. See App at C19 and E34. This is contrary to this Court's holding in cited case which states that the "catchall" provisions of Section 502(3)(5) acts as a safety net, offering appropriate equitable relief, and the general purpose of ERISA protections of beneficiaries' interests favor a reading that provides a remedy, more precisely set forth at App ___.

Halberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Plan and Agreement, 822 F.Supp. 247 (E.D.Pa.1993) states:

> ERISA provision obligating administrator of employee benefit plan to furnish to any plan participant or beneficiary statement indicating total benefits accrued and non-forfeitable pension benefit accrued requires administrator to provide computation to support amount stated upon a plan participant's request.

This was loosely provided as to only the pension annuity and was not signed, did not substantiate faulty dates and was in error with amount received. These discrepancies with no remedial correction blatantly ignore ERISA.

The signed Release of participant husband (now former) of Petitioner granted the right to information in 1987, prior to July 8, 1988 dissolution and issuance of a QDRO. The Respondents were aware of an impending divorce and were obligated to protect the interests of Petitioner.

A fiduciary has duty to disclose material information which a beneficiary did not know and needed to know, both for disclosure and to substantiate amounts received. To produce faulty records, or no records, when division of marital benefit assets occur pursuant to divorce, is a serious breach of fiduciary disclosure obligations. The lack of enforcement of this duty or preemption by state court to render ERISA invalid can severely affect the precarious economic health of divorced persons, creating endless hardship for many.

B

The Decisions Allow ERISA Fiduciary Obligations of Disclosure to be Preempted by State Court Issuance of QDRO, Leaving a 27-Year Gap of Unnamed Fiduciaries for ERISA Protected Plans

This case demonstrates that ERISA can be compromised, negated and circumvented and is a model of failure to date when the protections as envisioned by the Retirement Equity Act of 1984 (REA) have been altered. The object of the necessary REA was to better protect women who had contributed to their marriage's financial security through their work in home, anticipated sharing in husband's retirement, were left dependent on husband's earnings, at mercy of divorce and death.

If plans disclosure for all the years contribution and matching funds were denied the women or men this Act addressed would lose their savings, resulting from sacrifice and often a frugal lifestyle. This is extremely unjust and does not encourage the respect the law and the courts aspire to – to give security and hope rather than constant apprehension.

The plan administrators in this case are ALL of the Respondents in the absence of a named plan administrator during the 27-year gap from 1961 to 1988 decree. 29 U.S.C. § 1002(16)(A). Respondent William M. Mercer of Ky., Inc., one of many entities, signed affidavit was discovered to be faulty. See App D27.

The plans awarded under the QDRO remain unsubstantiated with no recourse, no accruals or interests on delayed awarded plans. This is contrary to ERISA law, fiduciary obligations clarified by this Court in *Howe, supra,* and *Halberern v. Kaupp Vascular Surgeons Ltd., Defined Benefit Plan and Agreement* citation.

C

The Decision Gives Participant a Greater Right than Beneficiary to Jointly Owned Marital Benefits, to Disclosure and Remedy to Recover

ERISA 502(a)(3) authorizes lawsuits for individualized equitable relief for breach of fiduciary obligations, denied Petitioner in this case. Does dissolution suggest different rights and distributional standards with a hide and seek mindset, all's fair caveat as an unwritten law? Participants are made aware of their benefits (presumably) beneficiaries as joint marital owners are not.

ERISA does not allow discrimination and REA recognizes that benefit assets are joint. Petitioner has been denied merger, contributions, withdrawals, loans, matching funds and like information to document history of plans since 1961. Participants access to information, remedies and full control of marital benefit assets before a qualifying event is not equally available to beneficiaries.

In our supposed civilized society dissolution games and theatrics should be replaced by serious reverence for the law, full disclosure and strict compliance. The repeated court filings to enforce, affordable to few, would diminish, a better example would be set to encourage future compliance with ALL law. Divorce is a vulnerable time, further weakened by trickery, delays and unjust decisions. Our society suffers.

CONCLUSION

For the foregoing compelling reasons, the Petitioner respectfully urges the Court to grant its writ of certiorari.

Respectfully submitted,

LORENA FAY OVERFIELD
1236 West 62nd Street
Kansas City, Missouri 64113
816-822-1349

Petitioner pro se

January 21, 1997

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95-4050

Lorena Fay Overfield, Appellant, v. Francis N. Bonsignore; Marsh and McLennan Companies; William M. Mercer, Inc.; William M. Mercer of Kentucky, Inc., Appellees.	*	Appeal from the United States District Court for the Western District of Missouri. (UNPUBLISHED)

Submitted: October 3, 1996

Filed: October 15, 1996

Before BEAM, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Lorena Overfield appeals from the district court's[1] orders dismissing one defendant and granting summary

[1] The Honorable Dean Whipple, United States District Judge for the Western District of Missouri.

judgment to the remaining defendants in her action brought under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. Having carefully reviewed the record and the parties' briefs, we conclude the judgment of the district court was correct. Accordingly, we affirm. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95-4050WMKC

Lorena Fay Overfield,	*	
	*	
Appellant,	*	
	*	
vs.	*	Order Denying Petition for
	*	Rehearing and Suggestion
Francis N. Bonsignore, et al.,	*	for Rehearing En Banc
	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 4, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

LORENA FAY OVERFIELD Plaintiff	)	
v.	)	No. 94-0991-CV-W-1
FRANCIS N. BONSIGNORE, et al. Defendants	)	

ORDER

(Filed Nov. 22, 1995)

Pending before the Court is Plaintiff's motion for reconsideration of the Court's Order granting summary judgment in favor of Defendants. Plaintiff offers no additional relevant facts or legal bases that merit reconsideration of the summary judgment Order. As a consequence, Plaintiff's motion must be denied. It is therefore

ORDERED that Plaintiff's motion for reconsideration of the Court's Order granting summary judgment in favor of Defendants is DENIED.

/s/ Dean Whipple
Dean Whipple
United States District Judge

Dated: November 22, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

LORENA FAY OVERFIELD	)	
	)	
Plaintiff	)	No. 94-0991-CV-W-1
v.	)	
FRANCIS N. BONSIGNORE, et al.	)	
	)	
Defendants	)	

ORDER

(Filed Nov. 22, 1995)

Pending before the Court is Plaintiff's motion for reconsideration of dismissal of Defendant William M. Mercer of Kentucky, Inc. Plaintiff offers no additional relevant facts or legal bases that merit reconsideration of the Order dismissing Defendant William M. Mercer of Kentucky, Inc. As a consequence, Plaintiff's motion must be denied. It is therefore

ORDERED that Plaintiff's motion for reconsideration of dismissal of Defendant William M. Mercer of Kentucky, Inc. is DENIED.

/s/ Dean Whipple
Dean Whipple
United States District Judge

Dated: November 22, 1995

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

JUDGMENT IN A CIVIL CASE

LORENA FAY OVERFIELD Plaintiff, vs. FRANCIS N. BONSIGNORE, et al., Defendant.	)	No. 94-0991-CV-W-1

____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

____ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

__x__ **Decision by Court.** This action came before the Court as a briefed matter. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

the Court finds as a matter of law that defendant Mercer of Kentucky, Inc. is not a proper party to this action. It is therefore ORDERED that the motion of Defendant William M. Mercer of Kentucky, Inc. to dismiss pursuant to Rule 12(b)(6) is GRANTED.

(Entered on October 5, 1995)

---

that Defendants' motion for summary judgment is GRANTED. It is further

ORDERED that summary judgment is hereby GRANTED in favor of Defendant Francis Bonsignore, Defendant Marsh & McLennan Companies, Inc. and Defendant William M. Mercer, Inc. on all counts of Plaintiff's complaint.

(Entered on October 16, 1995)

October 16, 1995	R. F. Connor
Date	Clerk
Entered On OCT 16 1995	/s/ Illegible
	(by) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LORENA FAY OVERFIELD Plaintiff	)	
v.	)	No. 94-0991-CV-W-1
FRANCIS N. BONSIGNORE, et al. Defendants	)	

ORDER

Pending before the Court is Defendants' motion for summary judgment. Said motion together with Defendants' suggestions in support, Plaintiff's suggestions in opposition and Defendants' reply suggestions were reviewed by the Court. After due consideration of the above, for the reasons set forth below, the motion is granted.

I. Standard for Summary Judgment

A movant is entitled to summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, if there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party bears the burden of proof. *Aetna Life Insurance Co. v. Great National Corp.*, 818 F.2d 19, 20 (8th Cir. 1987). When considering a motion for summary judgment, a court must scrutinize the evidence in the light most favorable to the nonmoving party and the nonmoving party "must be given the benefit of all reasonable inferences." *Mirax Chem. Prods. Corp. v. First*

Interstate Commercial Corp., 950 F.2d 566, 569 (8th Cir. 1991) (citation omitted).

Once the moving party discharges this initial burden, the nonmoving party "may not rest upon the mere allegations or denials of the adverse party's pleading, but- . . . must set forth specific facts showing that there is a genuine issue for trial." Federal Rule of Civil Procedure 56(e). The United States Supreme Court requires that to establish a genuine issue of fact sufficient to warrant trial, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Court encouraged the use of summary judgment in appropriate cases: "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Id.* at 327 (citations omitted). *See also, City of Mt. Pleasant v. Associated Elec. Coop. Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

II. Background

Beginning in 1961, Plaintiff's former husband was employed by Meidinger, Inc. In 1984, Meidinger, Inc. was merged into William M. Mercer, Inc., a wholly-owned subsidiary of Marsh & McLennan Companies, Inc. ("MMC"). Plaintiff's former husband became a participant in both the MMC Retirement Plan and the MMC Stock Investment Plan and continued his employment

with the merged entity until his retirement in 1993. After Plaintiff and her husband divorced in 1988, Plaintiff was awarded certain designated assets from her former husband's employee benefit plans. In her complaint, Plaintiff alleges that Defendants breached their duties under the Employee Retirement Income Security Act of 1974 ("ERISA") by failing to provide her with information and documents relating to her former husband's benefit plans.

III. Discussion

A. Defining the Plan Administrator

In her complaint, Plaintiff alleges that Defendants failed to provide her with certain information concerning her benefits as an alternate payee under her former husband's employee benefit plans. Defendants assert that summary judgment must be entered in favor of all Defendants except the plan administrator because, pursuant to ERISA, only the plan administrator has a duty to disclose benefits information. ERISA requires a plan administrator to furnish certain information to participants and beneficiaries, either automatically or upon written request. 29 U.S.C. §§ 1024, 1025. ERISA further provides that an administrator who fails to provide such information can be subject to personal liability. 29 U.S.C. § 1132(c).

"Administrator" is defined by ERISA as follows:

> The term administrator means (i) the person specifically so designated by the terms of the instrument under which the plan is operated; (ii) if an administrator is not so designated, the plan sponsor; or (iii) in the case of a plan for

> which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

29 U.S.C. § 1002(16) (A). Francis Bonsignore is designated in the plan documents as the administrator of the two benefit plans at issue here: the MMC Retirement Plan and the MMC Stock Investment Plan. *Defense exhibits* 31 and 32; *Answer of Francis Bonsignore,* at 1. Plaintiff states in her suggestions in opposition to this motion that she is unsure whether Mr. Bonsignore is or is not the plan administrator. *Plaintiff's suggestions,* at 7. However, she fails to set forth specific facts showing that anyone other than Mr. Bonsignore is the plan administrator. More importantly, Plaintiff affirmatively states in her complaint that Mr. Bonsignore is the "present Plan Administrator." *Plaintiff's complaint,* at 2. Thus, no genuine issue of fact exists as to Mr. Bonsignore's status as plan administrator.

An entity cannot be sued under Section 1132(c) unless it is designated as the plan administrator under Section 1002(16)(A). *Moran v. Aetna Life Ins. Co.,* 872 F.2d 296, 299-300 (9th Cir. 1989). Moreover, if a plan specifically designates a plan administrator as defined in Section 1002(16)(A), then "that individual or entity is *the* plan administrator for purposes of ERISA." *McKinsey v. Sentry Ins.,* 986 F.2d 401, 404 (10th Cir. 1993) (emphasis in original). *See also Davis v. Liberty Mut. Ins. Co.,* 871 F.2d 1134, 1138 (D.C. Cir. 1989) (party not named as plan administrator could not be held liable under Sections 1024(b)(1) and 1132(c)). Therefore, as a matter of law, an individual or entity other than the designated plan administrator cannot be sued for failure to disclose benefit information. As Mr.

Bonsignore is specifically designated as the plan administrator of the two MMC benefit plans at issue, he is the only proper defendant. Accordingly, summary judgment must be granted in favor of the other named Defendants: MMC and William M. Mercer, Inc.[1]

B. Plaintiff's Standing

Plaintiff is entitled to benefits from the MMC benefit plans only by virtue of the Qualified Domestic Relations Order ("QDRO") that was entered on July 8, 1988 in conjunction with her divorce decree.[2] Plaintiff is designated in the QDRO as an "alternate payee" under both the MMC Retirement Plan and the MMC Stock Investment Plan. ERISA defines an "alternate payee" as "any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant." 29 U.S.C. § 1056(d)(3)(K). As an alternate payee, Plaintiff has the status of a "beneficiary" and, thus, is entitled to bring a claim under Section 1132(c).[3] 29 U.S.C. § 1056(d)(3)(J). However, until the QDRO was entered on

---

[1] Defendant William M. Mercer of Kentucky, Inc. was previously dismissed pursuant to Rule 12(b)(6).

[2] The QDRO was amended on September 29, 1988 to correct typographical errors in the original. Defense exhibit 1.

[3] Plaintiff contends that a release signed by her former husband in October 1987, allowing her former husband's employer to provide information to her about his benefits, granted her the status of a "participant" under ERISA. This assertion, unsupported by any authority, is simply erroneous.

July 8, 1988, Plaintiff was not considered a beneficiary. Consequently, Plaintiff has no standing to bring a claim for any alleged failures to provide information before that date.[4] *See Stephen Allen Lynn, P.C Employee Profit Sharing Plan and Trust v. Stephen Allen Lynn, P.C.*, 25 F.3d 280, 282 (5th Cir. 1994).

C. Liability under Section 1132(c)

Section 1132(c) provides in relevant part:

> [a]ny administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary . . . by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c)(1). Thus, liability under Section 1132(c) cannot be imposed unless and until a beneficiary, or participant, requests from the plan administrator the information to which he or she claims entitlement, and the plan administrator fails to comply with the request

---

[4] Defendants also contend, and Plaintiff disputes, that any of Plaintiff's claims arising before October 18, 1991 are time-barred by a Missouri statute of limitations. In light of the Court's other holdings in this Order, this issue is moot.

for at least 30 days. 29 U.S.C. § 1132(c)(1)(B); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1167 (3d Cir. 1990).

The Court must first determine if any of Plaintiff's letters qualify as requests for information as defined in Sections 1024 or 1025. Section 1024 states in relevant part:

> [t]he administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.

29 U.S.C. § 1024(b) (4). Section 1025 states in relevant part:

> [e]ach administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information –
>
> (1) the total benefits accrued, and
>
> (2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

29 U.S.C. § 1025(a).

In 1990, 1991 and 1993 Plaintiff sent letters and made several telephone calls to MMC employees regarding the MMC Stock Purchase Plan, various tax matters, alleged errors in Plaintiff's divorce decree, and the possibility of altering the annuity option on her retirement benefits. Defense exhibits 17, 19 and 21. However, none of these

requests are relevant for purposes of this case, as they have no bearing on Mr. Bonsignore's disclosure obligations under Sections 1024 or 1025.

The first relevant written request made by Plaintiff was a letter dated April 1, 1994 and addressed to Eric Sherman at MMC stating as follows:

> It is my understanding that I am entitled to an accounting of the relevant figures in calculating my pension. I would request the calculations, as well as the formulas and necessary contributions by the company, beginning in which year, and the amount designated as pension contributions for each year. Please be explicit.

Defense exhibit 23. However, this letter does not request any of the plan instruments as contemplated in Section 1024(b)(4), thus, it cannot be considered a request pursuant to Section 1024. This letter also does not request any of the information set forth in Section 1025(a), and consequently, it cannot be considered a request pursuant to Section 1025. Nonetheless, the Court notes that in its letter in response to Plaintiff's request, MMC provided. Plaintiff with the information she requested, specifically, a breakdown of the method used to calculate her pension payments. *Defense exhibit* 24.

Plaintiff's last written request to MMC, dated July 28, 1994, is addressed to Mr. Bonsignore. *Defense exhibit* 26. This letter does contain valid requests by Plaintiff for information pursuant to Sections 1024(b)(4) and 1025(a). For example, Plaintiff requests that Mr. Bonsignore provide her with summary plan descriptions and annual reports and "[p]rovide [a] statement of total benefits accrued . . . ." *Defense exhibit* 26, at 4. In this letter,

Plaintiff also correctly notes that a response by Mr. Bonsignore is required within thirty days. *Defense exhibit* 26, at 5. Plaintiff states that this letter was sent by registered mail, however, it is unclear on what date Mr. Bonsignore actually received the letter.

On September 8, 1994, Mr. Sherman informed Plaintiff that a response to her letter was being prepared and would be sent by September 15. *Defense exhibit* 27. By letter dated September 16, 1994, Mr. Sherman responded to Plaintiff's July 28 letter. Plaintiff asserts that Mr. Sherman's response took more than the 30 days mandated by Section 1132(c)(1)(B). *Plaintiff's suggestions*, at 6. This is a colorable claim as Defendants do not rebut Plaintiff's untimeliness argument and the dates of the letters suggest that more than 30 days passed between Plaintiff's letter and Defendants' response.

However, even assuming that Mr. Sherman's response was somewhat untimely, Plaintiff would not be entitled to damages under Section 1132 because Defendants did not act in bad faith. The following observation by the Third Circuit is instructive: "if the employer displayed no bad faith in responding to the claim [for information under ERISA] – taking somewhat too long to respond to it, for instance, but not ignoring it entirely – then the district court would be well within its discretion in setting damages at $0." *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134, 153 (3d Cir. 1987). *See also Maiuro v. Federal Express Corp.*, 843 F. Supp. 935, 943 (D.N.J. 1994). After reviewing the extensive amount of correspondence between Plaintiff and Defendants, the Court finds that Defendants attempted to accommodate each of Plaintiff's requests, even though most were not technically proper

requests under ERISA. Accordingly, the Court finds that Defendants did not act in bad faith and no penalties will be imposed under Section 1132.

D. Disclosure Requirements under Sections 1024 and 1025

Next, the Court must determine whether Plaintiff has received all of the information to which she is entitled under Sections 1025(a) and 1024(b)(4). In Plaintiff's letter of July 28, 1994, her only valid written request, she makes several specific requests for information. Although Mr. Sherman provided most of this requested information in his response, ERISA requires only that he provide the specific disclosures set forth in Sections 1025(a) and 1024(b)(4).

1. Section 1025(a) disclosures

Although Plaintiff mirrors the language of Section 1025(a) in her letter by asking Mr. Bonsignore to "[p]rovide [a] statement of total benefits accrued," the benefit accrual information she requests is for the period 1961 through July 8, 1988. *Defense exhibit* 26, at 4. As noted above, Plaintiff did not have standing as an ERISA "beneficiary" before July 8, 1988. Therefore, she is not entitled to any benefit accrual information for the years before 1988.

Even if Plaintiff had made a proper Section 1025(a) request for information on accrued benefits after July 8, 1988, Defendants have already satisfied this requirement. Pursuant to the QDRO, Plaintiff received a lump sum

payment of $345,342.00 as her share of the MMC Stock Investment Plan. *Defense exhibit* 1, at 29. As such, Plaintiff's total accrued benefits amounted to $345,342.00 when she received her lump sum distribution in November 1988. She has already received the total benefits to which she is entitled under the MMC Stock Investment Plan and no further benefits will accrue to her.

Plaintiff has also received a breakdown of her accrued benefits in the MMC Retirement Plan. Defendants satisfied this requirement when, in response to Plaintiff's April 1, 1994 letter, they provided Plaintiff with the formula used to calculate her monthly pension payments. *Defense exhibit* 24. Pursuant to the QDRO, Plaintiff receives $832.08 every month – no more or less than this set amount will accrue to her. Because Defendants have already informed Plaintiff as to the amount of her accrued benefits under both the MMC Retirement Plan and the MMC Stock Investment Plan, they have satisfied the requirements of Section 1025(a).

2. Section 1024(b)(4) disclosures

Section 1024(b)(4) requires a plan administrator to provide, upon request, a summary plan description, plan description, annual report, or other plan instruments. In her July 28, 1994 letter, Plaintiff requests, "any and all summary plan descriptions, annual reports, documents under which plans are established and operated, types of plans, types of plan administration, requirements and benefits . . . " *Defense exhibit* 26, at 4. Plaintiff acknowledges that she has received a "Summary Plan Description," *Plaintiff's suggestions*, at 6, and a "summary annual

report for the MMC retirement plan . . . for 1993,"[5] *Plaintiff's suggestions*, at 7. Moreover, all other information requested in Plaintiff's letter is either subsumed in the summary plan descriptions and annual report or is information Defendants are not, under Section 1024(b)(4), required to disclose. Finally, in her July 28 letter Plaintiff requests Defendants to provide certain information relating to Meidinger, Inc. However, Defendants are under no obligation to provide such information because Meidinger, Inc. merged with MMC in 1984 and Plaintiff has no standing to assert ERISA claims arising before July 8, 1988. Therefore, Plaintiff is not entitled to receive this superseded plan information.

E. Alleged Breach of Fiduciary Duties

Plaintiff also alleges that Mr. Bonsignore is liable for breach of fiduciary duty. However, ERISA does not allow a claim for breach of fiduciary duty based on a plan administrator's alleged failure to provide information. *See Davis v. Liberty Mut, Ins. Co.*, 871 F.2d 1134, 1138, n.5 (D.C. Cir. 1989). Moreover, a plaintiff may only bring an ERISA claim for breach of fiduciary duty when the alleged breach "is one of duty to the plan itself." *Placzek v. Strong*, 868 F.2d 1013, 1014 (8th Cir. 1989) (citing *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985)).

Furthermore, the Court notes that at various junctures throughout her suggestions in opposition to this

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[5] 1993 is the latest year for which annual report figures are available. *Defense exhibit* 36, affidavit of Patricia A. Agnello.

motion and in her letters to MMC, Plaintiff complains that her QDRO is based on erroneous assumptions and that her choice of annuity options was made on the basis of incomplete information provided by her former attorney. Such contentions are irrelevant to this action, which is premised on ERISA. This is not the proper forum for Plaintiff to express her dissatisfaction with her former attorney or the results of her QDRO.

F. Damages under ERISA

In addition to the statutory penalty provided by Section 1132(c), Plaintiff seeks damages of $1,000,000. However, under the present circumstances, an award of damages is inappropriate. "Though § 1132(c) concludes by ambiguously granting a court the discretionary power to 'order such other relief as it deems proper,' nothing in that subsection, or § 1132 as a whole, suggests that ERISA would approve of an affirmative damage recovery based merely on a plan administrator's failure to adhere to proper notification and disclosure procedures." *Lewandowski v. Occidental Chem. Corp.*, 986 F.2d 1006, 1008-09 (6th Cir. 1993). *See also Kreutzer v. A.O. Smith Corp.*, 951 F.2d 739, 743 (7th Cir. 1991); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1167 (3d Cir. 1990); *Simmons v. Diamond Shamrock Corp.*, 844 F.2d 517, 524-25 (8th Cir. 1988). Historically, plaintiffs have received monetary relief for technical violations of ERISA disclosure requirements only in very exceptional cases. *Kreutzer*, 951 F.2d at 743. Examples of such cases include those where the administrator has acted in bad faith, actively concealed a benefit plan, or induced reliance on a faulty plan summary. *See, e.g., Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353-54 (9th

Cir.), *cert. denied*, 474 U.S. 865 (1985). While Plaintiff asserts that she has not received all of the information to which she is entitled, she does not allege that Mr. Bonsignore concealed the existence of the MMC Retirement Plan or the MMC Stock Investment Plan. She has also failed to produce facts showing that Mr. Bonsignore's alleged disclosure violations have caused her any harm. In addition, she offers no support for her claim that Mr. Bonsignore's alleged non-compliance was "arbitrary and capricious." Accordingly, an award of damages is inappropriate and summary judgment must be granted in favor of Defendants on this issue.

IV. Conclusion

It is therefore ORDERED that Defendants' motion for summary judgment is GRANTED. It is further

ORDERED that summary judgment is hereby GRANTED in favor of Defendant Francis Bonsignore, Defendant Marsh & McLennan Companies, Inc. and Defendant William M. Mercer, Inc on all counts of Plaintiff's complaint.

/s/ Dean Whipple
Dean Whipple
United States District Judge

Dated: Oct. 16, 95

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LORENA FAY OVERFIELD	)	
	)	
Plaintiff	)	No. 94-0991-CV-
v.	)	W-1
	)	
FRANCIS N. BONSIGNORE, et al.	)	
	)	
Defendants	)	

ORDER

(Filed Oct. 5, 1995)

Pending before the Court is the motion of Defendant William M. Mercer of Kentucky, Inc. ("Defendant Mercer of Kentucky") to dismiss pursuant to Rule 12(b)(6). Said motion together with Defendant's suggestions in support, Plaintiff's suggestions in opposition and Defendant's reply suggestions were reviewed by the Court. After due consideration of the above, for the reasons set forth below, the motion is granted.

I. Standard for Motion to Dismiss

In presenting this motion, Defendant Mercer of Kentucky relies on matters that are outside of the pleadings, specifically the affidavit of Victor Romanov. Therefore, the Court will treat the motion to dismiss as one for summary judgment.[1] Federal Rule of Civil Procedure 12(b).

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[1] This motion would be granted by the Court whether characterized as a motion to dismiss or as a motion for summary judgment.

II. Standard for Summary Judgment

A movant is entitled to summary judgment pursuant to Federal Rule of Civil Procedure 56(c), if there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party bears the burden of proof. *Aetna Life Insurance Co. v. Great National Corp.*, 818 F.2d 19, 20 (8th Cir. 1987). When considering a motion for summary judgment, a court must scrutinize the evidence in the light most favorable to the nonmoving party and the nonmoving party "must be given the benefit of all reasonable inferences." *Mirax Chem. Prods. Corp. v. First Interstate Commercial Corp.*, 950 F.2d 566, 569 (8th Cir. 1991) (citation omitted).

Once the moving party discharges this initial burden, the nonmoving party "may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Federal Rule of Civil Procedure 56(e). The United States Supreme Court requires that to establish a genuine issue of fact sufficient to warrant trial, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Court encouraged the use of summary judgment in appropriate cases: "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive

determination of every action.' " *Id.* at 327 (citations omitted). *See also, City of Mt. Pleasant v. Associated Elec. Coop. Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

III. Background

Beginning in 1961, Plaintiff's former husband was employed by Meidinger, Inc. In 1984, Meidinger, Inc. was merged into William M. Mercer, Inc., a wholly-owned subsidiary of Marsh & McLennan Companies, Inc. He continued his employment with the merged entity until his retirement in 1993. After Plaintiff and her husband divorced in 1988, Plaintiff was awarded certain designated assets from her former husband's employee benefit plans. In her complaint, Plaintiff alleges that Defendants breached their fiduciary duties under ERISA by failing to provide her with information and documents relating to her former husband's pension plan and other benefits.

IV. Discussion

Section 502 of ERISA provides the exclusive enforcement mechanism and grants the exclusive remedies available for causes of action under ERISA. 29 U.S.C. § 1132 (1988). Section 502(c) provides in relevant part:

> [a]ny administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary . . . may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal . . .

29 U.S.C. § 1132(c). Thus, under Section 502(c) only the administrator of a plan is subject to potential personal liability for failure to provide information. Therefore, as a matter of law, parties other than plan administrators are not proper parties to a Section 502(c) action. Defendant Mercer of Kentucky asserts that it is not the administrator of the employee benefit plans at issue in this case and, thus, is not amenable to Plaintiff's claims. Francis Bonsignore, a separately-named defendant in this action, is specifically designated in the plan documents as the administrator of the Marsh & McLennan plans at issue here.

In response, Plaintiff claims that 29 U.S.C. § 1002(16)(A)(ii) deems the plan sponsor to be the plan administrator whenever, as with Defendant Mercer of Kentucky, an administrator is not specifically designated. However, Defendant Mercer of Kentucky is a shell corporation that has never had any employees and exists solely for the purpose of maintaining insurance brokerage and insurance agency licenses in the State of Kentucky. *See* affidavit of Victor Romanov.[2] More importantly, Defendant Mercer of Kentucky has never sponsored or maintained any employee benefit plans. All obligations of Meidinger, Inc. were assumed by William M. Mercer, Inc. and, as noted above, Francis Bonsignore, is designated as the administrator of the plans for that entity.

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[2] Plaintiff does not dispute that Defendant Mercer of Kentucky is merely a shell corporation.

V. Conclusion

In light of the foregoing, the Court finds as a matter of law that Defendant Mercer of Kentucky is not a proper party to this action. It is therefore

ORDERED that the motion of Defendant William M. Mercer of Kentucky, Inc. to dismiss pursuant to Rule 12(b)(6) is GRANTED.

/s/ Dean Whipple
Dean Whipple
United States District Judge

Dated: Oct. 5, 95

APPENDIX D

STATUTORY PROVISIONS INVOLVED IN THIS CASE

29 U.S.C. § 1002(16)(A) states in relevant part:

> "The term administrator means – (i) the person specifically so designated by the terms of the instrument under which the plan is operated; (ii) if an administrator is not so designated, the plan sponsor; or (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

29 U.S.C. § 1056(d) (3) (K) ERISA defines an "alternate payee" and states in relevant part:

> any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

29 U.S.C. § 1056(d) (3) (J) states in relevant part:

An alternate payee is granted the status of "beneficiary"

29 U.S.C. § 1132(c) states in relevant part:

> Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request

> may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1024(b) (1) states in relevant part:

> The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and all modifications and changes referred to in section 1022 (a)(1) of this title

29 U.S.C. § 1024(b)(4) states in relevant part:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.

29 U.S.C. § 1025(a) states in relevant part:

> each administrator or an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information –
>
> (1) the total benefits accrued, and
>
> (2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

29 U.S.C. § 1140, ERISA Section 510 states in relevant part and prohibits a person from discriminating against a:

> participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, [or] this subchapter . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, [or] this subchapter.

29 C.F.R. § 2520.102-3(p) states in relevant part:

> the sources of contributions to the plan, and the method by which contributions are calculated

29 C.F.R. § 2520.102-3(q) states in relevant part:

> the identity of any funding medium used for the accumulation of assets through which benefits are provided. . . . shall identify any insurance company, trust fund,. . . . or entity which maintains a fund on behalf of the plan or through which the plan is funded or benefits are provided.

The Retirement Equity Act of 1984 Pub.L.98-397, 98 Stat. 1426, effective January 1, 1985, states in relevant part:

> an employee's pension benefits are jointly owned by the employee and his spouse

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APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 95-4050

LORENA FAY OVERFIELD,

Appellant

v.

FRANCIS N. BONSIGNORE, et al.,

Appellees.

PETITION FOR REHEARING
WITH SUGGESTION FOR
REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR APPELLANT

Lorena Fay Overfield
1236 West 62nd Street
Kansas City, Missouri 64113
816-822-1349

Appellant pro se

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PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

COMES NOW Appellant Lorena Fay Overfield, to respectfully offer her Petition for Rehearing with Suggestion for Rehearing En Banc, pursuant to Rule 35 and Rule 40 of the Federal Rules of Appellate Procedure, and Eighth Circuit Rules 35A and 40A.

The compelling issues in this case and the clarification and enforcement of ERISA protections are of grave importance to those persons affected by benefit plans disclosure and their subsequent divisions as provided by QDRO. This case outcome has allowed ERISA to be circumvented and is a model of failure. It is thus of primary importance to future dissolution parties and to future beneficiaries.

Benefits disclosure is of critical importance to the dissolution discovery process. Fiduciary ethics and responsibilities should not be compromised. Resultant inequities created by ambiguous interpretations of ERISA law necessarily result in an exceptional public need to secure and protect those assets. Dissolution negligence or greed, fiduciary incompetence or lack of ethics should not pre-empt, diminish or negate federal law. This case compels a re-examination of ERISA law and its effective enforcement as envisioned by Congress and enacted to preserve employee benefit rights, deemed marital property, in an equitable manner.

I express a belief, based on a reasoned and studied judgment, that the decision is contrary to the following decisions of the United States Court of Appeals for the Eighth Circuit and Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

> *Varity Corp. v. Howe et al* Supreme Court of the United States Certiorari to the United States Court of Appeals for the Eighth Circuit – No. 94-1471 Decided March 19, 1996

/s/ Lorena Fay Overfield
Lorena Fay Overfield pro se

I express a belief, based on a reasoned and studied judgment, that this appeal raises the following questions of exceptional importance:

1. Did Congress make ERISA too difficult to enforce under present law?

2. May co-owned marital benefits be forfeited when mergers occur without the knowledge of both the participant and alternate payee/designated beneficiary?

3. Is there a separate set of remedies available to enforce fiduciary breach when disclosure of all ERISA assets to protect individual rights is denied pursuant to dissolution?

4. Does issuance of QDRO at the state court level pre-empt federal ERISA law?

5. Are benefit plan marital assets divisible under a QDRO without readily discernible verification and history of contributions?

6. Has the safety net provided by the general "catchall" provision in the structure of ERISA 502 failed to remedy the fiduciary breach in this case?

7. Is participant given a greater right than alternate payee/beneficiary in jointly owned marital assets under ERISA?

8. May fiduciaries discriminate?

9. If benefit plan assets were available and known only to alternate payee/beneficiary would the outcome be the same?

10. Is secrecy tolerated and not considered a fiduciary breach in denying essential information to corroborate amounts awarded?

/s/ Lorena Fay Overfield
Lorena Fay Overfield pro se

SUGGESTIONS IN SUPPORT OF
PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

Appellant Lorena Fay Overfield offers the following Suggestions in Support of her Petition for Rehearing with Suggestion for Rehearing En Banc. She respectfully suggests that in her opinion the decision rendered directly conflicts with both Supreme Court and Eighth Circuit Court precedent. The all encompassing ERISA law appears to have been overlooked and misapprehended in application to this case. It is of serious importance to maintain and secure uniformity of decisions in this massive and complex law. It is imperative to clarify and reiterate the law to minimize future disputes and cases of a similar nature.

The following inconsistencies bear review and are respectfully offered:

1. The decision of the Court of Appeals for the Eighth Circuit states that Appellant's action was brought under ERISA, 29 U.S.C. 1001-1461. This action was brought under the all encompassing ERISA statute and was not limited to cited subsections.

2. The Supreme Court of the United States Slip Opinion Syllabus in *Varity Corp. v. Howe et al.* No. 94-1471 Decided March 19, 1996, states in part: "In fact 502's structure suggests that Congress intended the general "catchall" provisions of subsections (3) and (5) to act as a safety net, offering appropriate equitable relief for injuries caused by violations that 502 does not elsewhere adequately remedy." and "ERISA's general purpose of

protecting beneficiaries' interests also favors a reading that provides respondents with a remedy."

3. The "catchall" section under ERISA, providing an equitable remedy for redressing violations of a plan or enforcing a plan was further implemented to address miscalculation and insufficient disbursement of benefits as cited by West's Federal Case News, August 2, 1996, Volume 19, No. 31 in:

   Youngberg v. Bekins Co. (E.D. CAL.) No. CIV S 95-96, LKK June 24, 1996 WL384243.

4. The Defendants, Francis N. Bonsignore, Marsh and McLennan Companies, William M. Mercer, Inc. and William M. Mercer of Ky., Inc., were acting in their capacity as plan administrators *AND* fiduciaries. Reiterated in cited Supreme Court Slip Opinion Syllabus, "To participate knowingly and significantly in deceiving a plan's beneficiaries". . . . "is not to act "solely in the interest of the participants and beneficiaries." and "ERISA 502(a) (3) authorizes lawsuits for individualized equitable relief for breach of fiduciary obligations."

5. A fiduciary under ERISA has duty to disclose material information which a beneficiary did not know and needed to know. Denial of benefits, beneficiary asking for explanation, is considered a request requiring an accountable response and is a basis for liability under ERISA.

6. Misrepresentations and misleading statements are breaches of fiduciary duty.

7. Fiduciary obligations were overlooked or misapprehended in this case. This conflicts with Supreme Court and Eighth Circuit precedent.

SUGGESTIONS IN SUPPORT OF QUESTIONS OF EXCEPTIONAL IMPORTANCE

1. Did Congress make ERISA too difficult to enforce under present law? This case is a model of failure in protecting marital ERISA assets, and the non-discriminatory right to information when requested. This allows a perpetuation of fiduciary breaches. Legal fees and time consuming court reviews both prohibit and inhibit unknowledgable, naive, trusting beneficiaries from accessing their rightful assets. This was not the purpose of the Retirement Equity Act allowing QDRO divisions. It should not be a vehicle to divert funds and conceal assets held to bypass rightful distribution.

2. May co-owned marital benefits be forfeited when mergers occur without the knowledge of *both* the participant and alternate payee/designated beneficiary? To keep secret merger terms and any forfeitures conditional to mergers/acquisitions hidden behind terminology, plan names, obscure entities and the like is to assure that continued confusion and unethical fiduciary acts will prevail.

   A participant death or divorce is another opportunity for concealment if information is withheld, all beyond the control of beneficiary without ERISA's effective enforcement.

3. Is there a separate set of remedies available to enforce fiduciary breach when disclosure of all ERISA assets to protect individual rights is denied pursuant to dissolution? There appears to be a separate standard for dissolutions and the inequities suffered than is standard for ordinary violations of law to protect one's assets. Is divorce indeed fair "game", with a cavaet mind set, without obligation to adhere to existing law? ERISA's "catchall" provision should apply if no other exists.

4. Does issuance of QDRO at the state court level preempt federal ERISA law? Without supporting information verified properly under federal law, ERISA can be effectively preempted and compromised, leaving a large loophole and potential for concealment. Without ERISA protection whatever is presented at dissolution prevails and is assumed to be valid, however erroneous.

5. Are benefit plan marital assets divisible under a QDRO without readily discernible verification and history of contributions? They are if fiduciary denies information to substantiate accounts and discovery fails, and there is no protection under the catchall ERISA statute to redress. This is not just.

6. Has the safety net provided by the general catchall provision in the structure of ERISA 502 failed to remedy the fiduciary breach in this case? This catchall provision has failed in this case to date. This appears to be a remedy offered under present ERISA law and one which was cited by recent Supreme

Court Slip Opinion Syllabus in *Varity v. Howe, et al.*

7. Is participant given a greater right than alternate payee/beneficiary in jointly owned marital assets under ERISA? ERISA deems benefit plans marital assets (equally owned joint assets) prior to division. A *greater* right is not equal. Lack of knowledge of assets in plans can result in an inequitable division. An inequitable division could force eventual welfare or hardship which would not be so if fully disclosed equitable divisions occurred.

8. May fiduciaries discriminate? ERISA says not. Appellant was successfully denied access to the information for her jointly owned marital assets protected by ERISA. This is not just.

9. If benefit plan assets were available and known only to alternate payee/beneficiary would the outcome be the same? Barring complex, indiscernible terminology within financial records provided by fiduciaries, it is hardly plausible that participants could be easily deceived. Participant and alternate payee/beneficiary were not considered to have equal ownership, access and rights to ERISA protected marital assets in this case. Is this the current precedent?

10. Is secrecy tolerated and not considered a fiduciary breach in denying essential information to corroborate amounts awarded? Secrecy is suspect and circumventing ERISA with fiduciary fancy footwork is shocking and an affront to Congress as drafters of this carefully crafted law. Without a remedy for

these failures ERISA requires supplemental remedial clarification to secure just outcomes.

The exceptional public importance of the questions raised are of primary importance to benefit plan security. The funds, comprising a major portion of family savings as well as national assets, bear careful scrutiny and enforcement to secure benefits. Dissolutions should not affect this security.

For the foregoing compelling reasons, the Appellant respectfully requests the Court to grant her Petition for Rehearing With Suggestion for Rehearing En Banc.

Respectfully submitted,

/s/ Lorena Fay Overfield
Lorena Fay Overfield
1236 West 62nd Street
Kansas City, Missouri 64113
816-822-1349

Appellant pro se

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 95-4050

LORENA FAY OVERFIELD,

Appellant

v.

FRANCIS N. BONSIGNORE, et al.,

Appellees.

APPEAL

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI,
WESTERN DIVISION
HONORABLE DEAN WHIPPLE, JUDGE

REPLY BRIEF FOR APPELLANT

Lorena Fay Overfield
1236 West 62nd Street
Kansas City, Missouri 64113
816-822-1349

Appellant pro se

IN REPLY TO SUMMARY OF THE CASE

Former husband Mahurin left the marital home in early 1985, maintained partial support and Plaintiff was briefly represented by counsel as seeking divorce was not then anticipated. Divorce was inevitable in 1986 and her then attorney was unable to secure verification of marital assets owned. In April, 1987 Plaintiff retained her divorce attorney and prior to this she was without representation during some periods. The lengthy discovery time resulted from difficulty in determination of assets. Overfield's awarded assets were the mortgaged home, her own non-marital assets and marital assets outside ERISA, largely used to pay her considerable attorney fees. Retirement and stock investment plan assets were left unverified, other ERISA plans were without verification and a QDRO was entered.

Less than six years from receipt of awarded ERISA assets Plaintiff filed to enforce ERISA disclosure. She filed in the circuit court to modify her unexpired maintenance and to enforce distribution of awarded assets left unpaid, subsequently denied and appealed, along with sanctions award that she believed was awarded in error. A finding of contempt was never entered, contrary to Defendants' statement. Plaintiff does not seek to re-litigate endlessly, rather to enforce decree and the protections of Missouri and Federal law. The district courts purported recognition of her supposed attempt to re-litigate is not in the record and unsupported by facts. Plaintiff's claim to ERISA violations in its many subsections is all encompassing and not limited to those cited by Defendants. Violations are subject to equitable relief deemed proper, penalties of up to $100 per day.

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IN REPLY TO
STATEMENT OF THE CASE

Pages 1, 2

To correct the Defendants' statements, the Plaintiff brought this ERISA action against the administrators of *all* benefit plans protected by ERISA as her right as an alternate payee/beneficiary from 1961.

The July 8, 1988 dissolution decree portions relevant to this case are cited in Plaintiff's Motion in Opposition to Summary Judgment, Exhibit 1. Defendants' Summary Judgment Exhibit 1 is the later nunc pro tunc decree of September 29, 1988, purportedly said to correct 'typographical errors' only. The inconsistency in the decrees demonstrate more alteration than merely typographical.

The QDRO was granted by the original July 8, 1988 decree, and included monthly striaght [sic] life annuity estimate ordered and awarded to Overfield. The Defendants' *'approved'* the QDRO with changes made in the September 29, 1988 nunc pro tunc decree. The monthly annuity estimated at $857.58 was $25.50 more per month than the monthly annuity of $832.08 received by her.

A Release, dated October 15, 1987, signed by Mahurin, allowing attorney Houdek to obtain information (Defendants' S.J. Ex.4) of all benefits and assets, was a part of many requests made to Defendants, not only the later requests made by letter in February, 1988.

Pages 3, 4

Plaintiff Overfield had no options under the granted QDRO by the Court on July 8, 1988. In August payment options were requested by attorney Houdek in his letter to Defendants, to relay to Overfield. Mr. Houdek suggested that she needed income, that her portion of retirement account was worth approximately $150,000. as a lump sum (contrary to decree). Overfield was later told that no lump sum option existed. The July 8,1988 decree granted the QDRO and set forth the terms.

72 days later the names of the plans awarded were changed to comply with *Defendants* requirements before processing Overfield's awarded QDRO. After 83 days a nunc pro tunc decree was entered and the QDRO declared valid. Plaintiff Overfield had no option to change or amend the nunc pro tunc decree as to form, content, approval or disapproval even though suggested

by attorney Houdek. Her divorce was granted and signed by Judge O'Leary on July 8, 1988.

The valuation of the pension plan at trial was never documented with actuarial calculations to verify amount to substantiate. Nor have documents been presented to Overfield to validate her co-owned marital retirement plan before or since. The Stock Investment Plan awarded was not substantiated nor was a history of accrued contributions, withdrawals, matching funds included in the evidence at trial, before trial or after trial in this co-owned marital benefit plan, the name of which was adjusted and changed to accomodate Defendants QDRO requirements.

The Plan Administrator as designated by both the July 8, 1988 and September 29, 1988 decrees is Vice President – Personnel without a proper name in this immense corporation with a vast number of affiliates. (Civil Docket ("CD") 84 attachments).

The July 8, 1988 decree decided the choice of monthly benefit straight life annuity for Plaintiff when no other option was made available to her by the terms of the decree coupled with the terms set forth by the Defendants in their QDRO requirements. Plaintiff Overfield's choices were limited to whether or not to diminish the annuity by the selection of a second beneficiary, reducing monthly income still further as per letter from Mr. Houdek.

Her benefits commenced in full some 27 days following the October 25, 1988 letter, and some 136 days from the July 8, 1988 decree awarding benefits pursuant to her divorce, (*beyond 90 days*).

Pages 5, 6

Mr. Houdek was granted leave to withdraw his representation of Overfield some 8 days before she retained Dennis Owens to represent her on appeal, preliminarily prepared by Mr. Houdek. While awaiting the outcome of the appeal Plaintiff made no additional requests to Defendants.

In September 1990 she made telephone requests, repeatedly through December 1990, in December, 1991, repeating again in 1993, 1994 (Defendants S.J. Ex. 3 at 4). In October, 1990 she made requests by letter (Defendants S.J. 18, 19) and the more specific December 12, 1990 letter left unanswered (Def. S.J. 19) (Def. S.J. Ex. 2 at 115, 116).

Her requests in 1993 were largely as a result of an IRS audit, with which she sought to comply with crucial documentation as to source and basis of stock awarded in decree. Numerous plan names were and are difficult if not impossible to determine whether or not ERISA qualifications applied or if stock awarded was to be taxed as a capital gain or ordinary income. Defendants did not clarify Overfield's individual assets awarded, did provide general information which continued confusion, helpful in part, largely non-specific and effectively evasive. The tax matters at issue related to *all* Defendants stock and benefit plans awarded to Overfield.

In 1994 Plaintiff was aware, through Department of Labor publications as well as an overview of ERISA law, that she was entitled to information she had heretofore been denied.

The calculation worksheet sent her by Eric Sherman was unsigned and was for an amount calculated through 1985 – not July 8, 1988 divorce date – (Def. S.J. Ex. 24 with attachment) which was for an amount of $832.09, rather than $832.08 which she receives – and for which there was no adjustment or explanation. There was no summary plan description included, additional to whatever it was supposed provided in the past and was never provided as promised. (Def. S.J. Ex. 2 at 121). A large amount of typewritten papers were received by Plaintiff in late September 1994, non-specific as to her own accrued assets in ERISA protected plans. The plan documents sent were general and the *quantity* was not a *quality* response to verify her own accrued assets from 1961 protected by ERISA.

Pages 7, 8

Plaintiff's last written request was one of many requests directed to the Plan Administrator, as defined as being the person so named, or in the absence of same, the Plan Sponsor, or the Plan Employer, or by designation otherwise. The Corporate Benefits Department, processing requests, were said to be proper contact for information; Participant Mahurin's direction of person to be contacted pursuant to request when information was sought by Overfield's attorney (Mahurin was a Principal, key employee of Defendant Mercer, reasonably suggesting his credibility as to proper administrator name and contact, as well as his being a pension benefit consultant since 1961 in this complex field); telephone operators of Defendants designation of proper person for benefit plan complaints and information when the general name of

Vice President – Personnel was listed in the decree. In this gigantic corporation there were many vice presidents and it is conceivable that a rotation of this responsibility to act as Plan Administrator existed. (C.D.68 with attached Bonsignore Depo. at 5 thru 15) (C.D.73).

The July 28, 1994 letter sent to Defendant Bonsignore by Overfield *ends* with an attachment of October 15, 1987 Release signed by participant Mahurin. The letter was received on August 3, 1994 by person signing for Mr. Bonsignore. The record reflects that a letter was sent on May 5, 1994 and received on May 9, 1994. (C.D. 68, Bonsignore Depo. at 19, 20, Plain. Ex. 1)

The Amendment dated January 1, 1989 was after divorce and distribution of funds to Plaintiff, however most likely drafted before her November, 1988 distributions.

Whether or not Overfield had access to plan documents earlier is based upon 1986 letter of participant Mahurin's attorney. Plaintiff was not aware of this specifically and sought factual marital asset computations at that time.

Plaintiff is uncertain as to the size and content of a Summary Annual Report. She was provided with a heading suggesting Summary Annual Report in the spring of 1994 for 1993. The delayed filing of required Summary Annual Report and 5500 Form with the IRS inhibits verification of assets at the time of distribution without knowledge of procedures and adjustments.

William M. Mercer of Kentucky, Inc. ("the Kentucky corporation") was *incorporated on November 19, 1975,*

shortly after ERISA was enacted, in Kentucky, as per Secretary of State of Kentucky Annual Report (Plaintiff's Motion in Opposition to S.J. Exhibit 3), dated June 30, 1995.

William M. Mercer, Inc. ("the Delaware corporation") was *incorporated in Kentucky on February 3, 1983,* approximately one year before the acquired Meidinger became a part of Defendants Mercer and MMC., (*much later than Mercer of Ky., Inc.*).

It is not the belief of Plaintiff that the *assets* of William M. Mercer of Ky., Inc. have *always* been a part of and wholly owned subsidiary of the Delaware corporation.

The Annual Report, Secretary of State, Kentucky cited above, lists some *50* persons housed in the *offices of the former Meidinger in Louisville, Kentucky* with whom Plaintiff has personal knowledge and acquaintance in part. This refutes the statement and supposition of *William M. Mercer of KY., Inc.'s never having employees* and existing solely for the purpose of maintaining insurance brokerage and insurance agency licenses from the state of Kentucky.

Mr. Mahurin may never have been employed by the present name William M. Mercer of Ky., Inc., as this is unknown to Plaintiff without history and documentation requested repeatedly. The Kentucky corporation may be the *surviving* holder of Meidinger plan assets, disbursing these funds apart from the Delaware corporation, William M. Mercer, Inc., leaving no trail of responsibility or method of determining a proper plan administrator, plan sponsor or plan employer in plans from 1961, without *strict compliance of fiduciary obligations* to protect and

inform voluntarily by the *surviving entities*, the Defendants.

The denial of information sought to clarify Plaintiff's co-owned marital benefits has prevented her from accessing her ERISA protected assets. If the plan administrator of the plans protected by ERISA are not continually named and updated, the plan sponsors, plan employers or designated parties bear the continuing obligation to inform in good faith to prevent non-disclosure of ERISA plans. The Defendants fit into each category of plan administrator by sponsorship, as employers, surviving employers and sponsors, or with the knowledge to designate responsible party to contact. To induce reliance on incomplete information is a violation of ERISA.

IN REPLY TO SUMMARY OF ARGUMENT

Plaintiff relies not only on those citations listed by Defendants as subsections of ERISA, but the all encompassing ERISA statute, meticulously structured by Congress to protect and ensure that pension and benefit plan assets may not be compromised by lack of disclosure, faulty fiduciary responsibility, or by the shifting of accrued assets to negate or diminish lifetime savings for retirement years. The many subsections in this massive law serve to clarify interpretation, not exclude the basis or purpose overall. The ERISA statute is the legal framework for analysis.

It is the belief of the Plaintiff that the district court erred in granting summary judgment. The clear language of ERISA defines "administrator", 29 U.S.C. 1002 16(A)

(B). Defendant Bonsignore is the present plan administrator, since 1990, of a portion of the plans at issue. The plans at issue in their entirety have accrued in various entities from 1961. The administrators of those plans are properly named as Defendants, in the absence of more precise information.

The uncontroverted facts (C.D. 72) are only the two decrees entered at divorce, July 8, 1988 and September 29, 1988, which have varying plan names under the QDRO, as well as other ERISA plans outside the QDRO, both categories unverified. The lack of information provided violate ERISA. The quantity of evasive information provided has not been a quality response to afford Plaintiff a determination of her individual and marital accruals and deposits under protected ERISA plans. Her efforts, termed indefatigable by Defendants, have matched Defendants indefatigability in denying requested information since October, 1987, interferring with her protected rights.

Plaintiff has standing as an alternate payee/beneficiary from 1961 and was given participant rights with the 1987 notarized Release signed by participant Mahurin to disclose ERISA protected marital assets, granted by the Retirement Equity Act of 1984. The *lump sum* payment under the Stock Investment Plan was determined under *another* name, unverified, in the July 8, 1988 decree, and *changed* to Stock Investment Plan on September 29, 1988 to accomodate [sic] Defendants QDRO, remaining unverified. Overfield's standing remains under this plan and any other ERISA plan with incomplete disclosure and adjustment.

Plaintiff was "damaged" as a result of her loss of asset *accruals* with incomplete distribution and verification. Her damages request was more descriptively equitable relief (as compensatory damages, not punitive) in the *estimated* sum in her pleadings due to the loss of potential *return* on undistributed amounts, consistent with her return on remaining *distributed* assets. 29 U.S.C. 1132 allows equitable relief deemed proper and a penalty of up to $100 per day. In large benefit accounts far more than $100 per day can be and is generated, reducing the effectiveness of the $100 per day as a deterrent to companies.

This Court has determined that ERISA is not to be treated as analogous to a penal state statute, and its statute of limitations is in error. The Missouri dissolution statute is analogous and timely in this Court and the pending Missouri case.

A genuine issue of law and fact exists and it is the belief of Plaintiff that granting summary judgment was in error.

IN REPLY TO ARGUMENT

Each Defendant bears the responsibility of providing information to Plaintiff pursuant to the ERISA statute and those responsibilities are not limited to the subsections cited by Defendants. The careful construction of the ERISA statute by Congress was and is to promote the non-alienation of employee benefits and retirement plans to assure employees and their beneficiaries that their lifetime savings cannot be negated or compromised by

manipulation of accounts or by concealing deposits and accruals.

As a co-owned marital asset, participant Mahurin has no larger right to these amounts than Plaintiff before proper appraisal and verification of assets is made. It defies logic that Congress intended to allow persons to *access* and *use* assets that do not properly belong to them. Is "stealing" condoned under the guise of name changes, transfers or whatever methods may be used? Is undermining necessary discovery condoned? Is refusing repeated requests for information to ascertain the disposition and worth of plans accruing over 30 years the expectation of this meticulously crafted law? The plans *at issue* are not only the awarded Retirement Plan and Stock Investment Plan (the name of which was changed to accomodate Defendants QDRO), but any and all plans from 1961, accruing substantially by the regular deposits of participant/alternate payee and the matching deposits by Defendants. Without a history of deposits, withdrawals and accruals, unknown to Plaintiff, it is not possible to determine balances.

Plaintiff was granted participant status with the signed Release of October, 1987, left unacknowledged by Defendants. She has no on-going record of her co-owned assets as the Defendants or the participants would or could have. If these parties do not allow her her rightful access to records and account value they have successfully circumvented Federal law. This effectively preempts ERISA by non-compliance and manipulation, narrowing requirements and obscuring responsibility.

29 U.S.C. 1132 allows Plaintiff her right to information to *enforce* and *clarify* her rights and *recover* benefits due. Information necessary cannot reasonably be only summary plan descriptions and the like as this is Plan information – not specific to her accrued and undistributed assets in this qualifying event preliminary to the issuance of a QDRO. Her repeated requests for balances and history on these co-owned assets have been evaded and denied.

Defendant Bonsignore has been the Plan Administrator since 1990 and has stated that he has no knowledge of 1988 occurrences, relevant to divorce distributions. (C.D. 68 – Bonsignore Depo. at p. 40). The prior plan administrator was not given a proper name; reverting to Plan Sponsor/Defendant Marsh and McLennan (with its many affiliates – see C.D. 84); along with Plan Employer/ Defendant William M. Mercer in its many names (as cited above); and the surviving William M. Mercer of Ky., Inc. entity, (remaining in the former acquired Meidinger offices, still occupied by former Meidinger employees who were fellow employees of participant Mahurin). Contrary to Defendants footnote 4, Plaintiff *does* dispute that Mercer of Ky. is only a shell corporation, without assets and employees, clarified by her October 11, 1995 letter and substantiated by the Secretary of State Annual Report. (C.D. 88 Reply Suggestions by Plaintiff to Motion for Reconsideration of Dismissal of William M. Mercer of Ky., Inc.) (Appellants Brief Addendum at 33,34,35).

Defendants cited *Wilson v. Southwestern Bell Telephone*, 55 F.3d 399,405 (8th Cir. 1995) states that fiduciaries have a duty to disclose circumstances that threaten, applicable here.

Because the Plan Administrator can be identified as each of the Defendants at varying times, they each were the *only* plan administrator responsible during each period that they were the surviving "plan administrator" or the "plan administrator" by virtue of no other designated plan administrator named. If the Defendants and their company policy choose to not keep their participants/alternate payees and beneficiaries apprised of their "plan administrator" by name, by neglect or design, it is proper to assume that the "plan administrator" is each of the Defendants. A rotating designation by title only is unfortunately a "hide and seek" exercise and an affront to those persons and their families who have contributed to the successes of their employers and participate in their offered and secured plans and eventually seek information of their assets owned.

The "personal liability" referred to by Defendants is little compensation for the use of undistributed assets which generate far more in large accounts, and little deterrent for these acts to only be subject to a maximum $100 per day fine when their "borrowed and undistributed" funds generate so much more.

Moran v. Aetna Life Ins. Co. is not analogous to this case without substantiating information that there *is* a third party administrator. Plaintiff has not been made aware of a Plan Administrator by name until 1994. The plan sponsor, employer and surviving sponsor are properly named plan administrators without additional information.

It is belief of the Appellant that summary judgment was awarded in error.

II.

Plaintiff disputes that the uncontroverted facts make it abundantly clear that she was provided all the information to which she is entitled under ERISA and much more. The only uncontroverted facts stipulated to by Plaintiff were the July 8, 1988 and September 29, 1988 dissolution decrees (C.D. 72). The 36 exhibits presented by Defendants are in part disputed as to receipt of same, and disputed further as to fulfilling the requirements of ERISA by incomplete and evasive responses to questions posed to enable proper valuations in *all* plans. In total they are incorrectly labeled "uncontroverted".

It is the Plaintiff's belief that the record and exhibits are ample proof that lack of disclosure has prevented her from her rightful access to her benefits, retained by the Defendants or other parties. The record speaks for itself and a genuine issue of fact exists. Is a valid enforcement of ERISA to be denied because the Defendants refuse to comply with requirements of ERISA law? Any claim would be labeled "metaphysical doubt" in the absence of supporting figures to document, which, if Plaintiff had had, would never have resulted in her lengthy divorce discovery period or her subsequent efforts to enforce ERISA law. Defendants are required to voluntarily give this information – not to protect only the participants or corporate interests but to equally protect alternate payees/beneficiaries. Fiduciaries have a duty to disclose circumstances that threaten the interests of each owner, and to *prevent bias.*

A.

Plaintiff Overfield disputes the Defendants' interpretation of ERISA as to information required and her tireless efforts are an attempt to enforce the law, enacted by Congress, rather than to permit an alteration of the law at the whim of corporate holders of assets. Defendants narrowing her requests to only the subsections cited is inaccurate and again, quantity of general information is not responsive to specific information requested to determine *her* marital assets. The information provided was lacking with many requirements left undone, one of which was the tardy summary annual report update first received in 1994 after the 1988 qualifying event.

The requests for information per the October 1987 Release was all encompassing (as the required Rule 26 disclosures are all encompassing) and sent first to Mercer, Meidinger, Hansen in the Kansas City office, as directed by participant Mahurin. A black handbook with MMC benefit plans information was used at a deposition in February, 1988 and those officers deposed knew that a divorce was pending, as well as Defendants. To diminish the purpose of the law by asserting that proper requests were not made and thus Defendants are not responsible is to reduce the valid requests to a judgment of an English composition class – awarding an A or an F as to format and content. There is no format required in the ERISA law to declare a request valid, nor did Congress contemplate the necessity of one by its exclusion. The continuing merits of requests are believed to be timely by Appellant, as well as to the standing remaining, contrary to footnote 10, page 17.

Further telephone requests were made prior to October, 1990 letter. The annuity option was the *only* monthly option available in the July, 1988 decree. While attorney Houdek made mention of the lump sum option being $150,000 (inconsistent with the listed $110,000) he later told Plaintiff that it was not available as a lump sum and could only be monthly, advising her that she "needed income", (quite accurate) and under those terms she signed the directions for annuity in October, 1988, naming no beneficiary (which would have reduced the amount further), and requesting no withholding of tax. The July, 1988 decree award did not list any amount other than a monthly amount ($25.50 more than she receives) and no *total* amount of her share was listed on the awarded pages relevant to the QDRO. (Plan. Opp. to Motion to S.J. Ex. 1 – page 29).

Ms. Brodley's January 4, 1991 letter, purported to be a response to Plaintiff's *specific* letter of December 12, 1990, was never received by Plaintiff (and interestingly notes a copy to Eris [sic] Sherman, whose name was first made known to Overfield in 1994). She was *never* provided with all information requested.

The 1993 letters of continuing requests for information was precipitated by the IRS audit and critical to her responses for required supporting data, nonetheless responded to by Defendants non-specifically as to ERISA qualified assets awarded basis and capital gain treatment of awarded stock and basis. ERISA information as to matching funds was excluded, not specific to her needs, and inside the scope of ERISA.

Summary plan description in effect at time of Plaintiff's divorce was never provided though promised and requested numerous times upon her non-receipt of same.

The 1988 QDRO included a title – Vice President – Personnel, one of many vice presidents in this corporate giant and not a proper name to contact. Plaintiff was an alternate payee/beneficiary, granted participant status by the Release of October, 1987. The QDRO was *awarded* in July, 1988, and *entered* following the September, 1988 decree (which had changed the names of the plans awarded in the July, 1988 decree).

The response to Plaintiff's registered letter of July 28, 1994 was received on August 3, 1994, with an answer dated September 16, 1994, received later. This is not within the 30 day requirement of ERISA, nor was all the required information sent.

The requirement of actuarial substantiation of benefits accumulated and accrued in plans is included in ERISA. If no signature validates the authenticity of amounts in plans it is possible for any employee, computer virus or dishonest person to erase, alter and amend ERISA protected assets. This has not been excluded in ERISA provisions, leaving no remedy to verify funds. The cited *Haberen v. Kaupp* at footnote 12, page 19 includes an ERISA requirement not just specific to the case. The partial reversal did not include but upheld the breach of fiduciary duty by requiring Haberen to sign a release to obtain benefits.

Footnote 13, page 19, is incorrect as to her knowledge of whether she could have had access to documents to substantiate her assets.

Under the facts of this case preliminary to a determination of assets accrued and deposited, benefits *must* be subject to calculation. The distribution awarded from the Employee Pre-Tax Savings and Thrift Plan (profit-sharing), a similar name to the Meidinger Pre-Tax Savings and Thrift Plan, deemed to be officially called the Marsh and McLennan Stock Investment Plan, excludes the other ERISA assets as listed on pages 10,11 (Plain. Sugg. in Opp. to S. J. Ex. 1). Letter from Eric Sherman of September 16, 1994 states unreceived letter from Plaintiff of December 12, 1990 (and stamp received by Corporate Benefits) which was purportedly responded to by Ms. Brodley's January 1991 letter never received by Plaintiff. Letter from Mr. Sherman additionally states that Defendants do not have record of plans and account information and that information should be requested of participant Mahurin. (Def. Motion for S. J. Ex. 28). This letter erroneously states that the terms of the QDRO were *assented* to by Plaintiff (outside the July 8, 1988 and September 29, 1988 decrees, the latter to correct only typographical errors). The terms of the QDRO were not at Plaintiff's option and it was awarded following a trial and judgment of the circuit court on July 8, 1988. The received benefits were at the direction of the court and requirements of Defendants and beyond the control and consent of Plaintiff. This was not a marital property settlement.

The annuity at $832.08 per month is .01¢ less than the calculation sheet sent covering the years to 1986, $25.50 less than estimated amount in July 8, 1988 and September 29, 1988 decrees.

It is the Appellants belief that the merits of the case did not support the district court's grant of summary judgment in favor of Defendants.

The retirement of Plaintiff's former husband in 1993 should have had no effect on her right to information and summary report updates prior to that time if indeed she was granted retirement funds. She essentially was *forced* to take her saved retirement funds in the form of an annuity one month *before* she was divorced, as the effective date was retroactive to June 1, 1988 – earlier than her divorce. This was five years before former husband retired and created the qualifying event to access these funds. The qualifying event activating Plaintiff's retirement was pre-divorce. If qualifying events are indeed death and divorce, it is analogous to taking life insurance one month before death without adjustment of amounts. This distribution was pursuant to the value at divorce – not 1986 and there remains no supporting information. The Stock Investment Plan is also at the mercy of the decision of the court, without supporting documents before or following the divorce to the Plaintiff's knowledge. The material *is* of such a character that it would directly assist the requesting plaintiff in determining her interests and rights in plans, as suggested by the *Maiuro v. Federal Exp. Corp.* as cited by Defendants. Plaintiff did not choose a straight-life annuity at the time of her divorce. She chose only to not withhold tax and did not name a beneficiary, which were the only choices available to her under the decrees, the Defendants' policy, and the information conveyed to her by her attorney. The ERISA protections and requirements, not limited to those cited by Defendants, are properly emphatic and precise. A

manipulation of the divorce process can result in severe deprivation of rights of uninformed beneficiaries. The federal system of enforcing pension rights is diminished when these inequities are condoned. The district court's order should not be affirmed.

B.

In the district court Plaintiff consistently maintained that lack of disclosure deprived her of her rights to her benefits, and that the denials by Defendants resulted in a breach of fiduciary duty and obligation to protect her assets, supported by the Defendants' citations, demonstrative of violations, not limited to the narrowed obligations of fiduciaries as stated by Defendants and their deletion of Labor Reg. 2520.104b-10. The original Complaint (C.D. 1) is a succinct statement claiming violation of ERISA and breach of fiduciary duty, repeatedly maintained in this case.

The equitable relief sought as reimbursement of lost *investment accruals* on *estimated* undistributed assets (as claimed as "damages" in the compensatory sense) is not a change of theory, rather a change of terminology. This has been maintained throughout. In footnote 16, page 22, Defendants erroneously conclude that mergers and consolidation of plans were never raised in the district court (governed by 29 U.S.C. 1058 subsection). The Meidinger acquisition by Defendants in 1984, stock exchanges and other merged aspects, with participant Mahurin as a major stockholder of the acquired Meidinger, was consistently before the court. This further is demonstrative of non-disclosure, preventing Plaintiff from knowing all

plans and inducing her to rely on incomplete information. The active concealment of benefit plans is indeed a breach of fiduciary duty. The *Howe* citation is analogous while not precisely on point. The concealed disposition of all plans has damaged Plaintiff in the estimated amount claimed as lost investment accruals available to her, consistent with the annual return generated on her distributed ERISA assets. (C.D. 83 with ref. to C.D. 77). Because the Defendants appear to have acted in bad faith, corroborated by the record, (denying Plaintiff's requests, resulting in the loss of investment accruals on her undistributed assets and leaving those undistributed assets unknown and inaccessible) it is supportive of their breach of fiduciary duty. The district court's order should not be affirmed.

III.

Plaintiff had standing to assert a *claim* upon *grant* of the QDRO on July 8, 1988, and she had participant rights to *disclosure* from October 15, 1987 Release date. This is similar to right to access medical records when Release is signed by patient. Should portions be withheld by and at the option of holder of records? The disclosure right granted was pursuant to a *qualifying event* dividing marital assets at divorce. Footnote 18, page 23 notes that QDRO was amended to accomodate plan rules of Defendants, which in effect preempted both the court and ERISA. The designation of alternate payee and beneficiary was descriptive of her rights under *each* and *every* ERISA plan from 1961 – not limited to those awarded in the September, 1988 nunc pro tunc decree. She was a beneficiary of all plans upon participant's death from

1961 and an alternate payee while participant lived. These marital assets are co-owned.

Standing remains to enforce obligation to disclose amounts of assets, accruals, withdrawals, matching funds contained in all ERISA plans – not limited to the Stock Investment Plan, which is an ever evolving name. Her standing is not limited by her acceptance of a court awarded dollar amount pursuant to this multi-named plan. As she was awarded by decree an amount that is without substantiation, she was *induced* to surrender her rights under ERISA, with the Defendants expectation of no recourse by the Plaintiff for their breach of fiduciary duty. The Defendants should not be able through its own malfeasance to defeat Plaintiff's standing. Revealing supporting documents is a simple, necessary request and if there is no discrepancy why evade? The "acceptance" of her *awarded* amount as a beneficiary with no knowledge of plans and their assets is not analogous to the *Winchester* case cited, nor the additional *Firestone* and *Bruch* cases and other citations. Plaintiff has a colorable claim as a beneficiary/alternate payee – not as a former employee – and the benefits awarded are not the only benefits to which she is entitled under multiple plans, regardless of name changes which confuse, perhaps by design. Her standing remains and the judgment should not be affirmed.

IV.

The damages requested, as explained in the foregoing, is not punitive but equitable relief for loss of accruals

on undistributed plans left unverified. This is an estimated amount, more decriptive as compensatory damages and equitable relief as granted under 29 U.S.C. 1132. ERISA is, as stated, interlocking, interrelated and interdependent and a remedial scheme which does not exclude equitable relief. The lack of information provided prevented Plaintiff's knowledge of her assets, thus preventing her accruals on undistributed plans (estimated as consistent with her awarded ERISA assets which annual return is in the record. (C.D. 77, C.D. 83). The district court order should not be affirmed.

V.

The filing of Complaint was not time-barred. The most analogous limitations period under Missouri law is the dissolution statute which precipitated this ERISA violation. The ongoing denials of information sought, coupled with new information of error in annuity calculation and 1099 R discrepancy of annuity amount first learned in 1994; the continuing maintenance and assets awarded left undistributed, (currently pending in the Missouri court) and the prejudicial nature of concealment to leave Plaintiff unaware of her assets and right to recover prior to her discovery of discrepancies, and her rights to information provided by Department of Labor publications, all render the limitations period as timely. This case is not analogous to a Missouri penal statute, nor is ERISA, in the equitable relief sought and provided under 29 U.S.C. 1132. The $100 per day provided is a fine, and discretionary equitable relief of accrued losses is not statutory damages. The district court's order should not be affirmed nor should Plaintiff's claims prior to October 18,

1991 be time-barred, in this moot point left unreached by the district court.

CONCLUSION

For the reasons set forth in the above, the Appellant respectfully urges the Court to reverse the District Court's Summary Judgment Orders of October 5, 1995 and October 16, 1995 and remand to the District Court for trial.

Respectfully submitted,

/s/ Lorena Fay Overfield
Lorena Fay Overfield
1236 West 62nd Street
Kansas City, Missouri 64113
816-822-1349

Appellant pro se

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

LORENA FAY OVERFIELD, Plaintiff,	)	
v.	)	Case No. 94-0991-CV-W-1
FRANCIS N. BONSIGNORE, et al.	)	
Defendants.	)	

IN REPLY TO DEFENDANTS' SUGGESTIONS IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT

(Filed Nov. 13, 1995)

Plaintiff states that her motion should not be treated as a motion to alter or amend judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure, as suggested by Defendants, but should be treated as a timely motion under Rule 60 which more accurately describes her filing.

The additional information submitted is relevant to Plaintiff's motion under Rule 60 and has evidentiary support.

This action concerns not only two employee benefit plans sponsored by Defendant Marsh and McLennan Companies, Inc. ("MMC") in which Plaintiff was awarded a portion by virtue of her divorce. This action concerns all of her undistributed, undisclosed, unsubstantiated marital assets in ERISA qualified plans from 1961 as a co-beneficial marital asset to be secured and administered in

compliance with ERISA by the Defendants and dismissed Defendant in this case.

The existence of other MMC plans and whether others exist is the most compelling aspect of the allegations of Plaintiff's original complaint, amended complaint and more definite statement. Failure to disclose has been and remains a primary issue.

The factual basis of her claim has been repeatedly demonstrated with inconsistent, vague and evasive answers to requests for information. ERISA enacted law in 1974 and the Retirement Equity Act in 1984 provide protection for pension assets to include spouses of participants. To circumvent those protections with a barrier of little redeeming consequence in the overall purpose of this law is to diminish the equity of ERISA.

For the above stated reasons, Plaintiff respectfully asks the Court to grant reconsideration of the summary judgment Order.

Respectfully submitted,

/s/ Lorena Fay Overfield
Lorena Fay Overfield
1236 West 62nd Street
Kansas City, Missouri 64113

Plaintiff pro se

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LORENA FAY OVERFIELD, Plaintiff, v. FRANCIS N. BONSIGNORE, et al. Defendants.	)	Case No. 94-0991-CV-W-1

REPLY TO DEFENDANT WILLIAM M. MERCER OF KY., INC.'S SUGGESTIONS IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF DISMISSAL

(Filed Nov. 13, 1995)

In Reply to Defendant William M. Mercer of Ky., Inc.'s Suggestions in Opposition to Plaintiff's Motion for Reconsideration of Dismissal Plaintiff states that her motion should not be treated as a motion to alter to amend judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure. Plaintiff's motion is more accurately pursuant to Rule 60 and is timely.

Plaintiff restates her allegations that the statements of Mr. Victor Romanov in his affidavit have been refuted by Verification Report filings in the state of Kentucky, by Plaintiff's personal knowledge of employees of William M. Mercer of Ky., Inc., by multi tax identification numbers of Marsh and McLennan affiliates in the surviving acquisitions pursuant to the merged Meidinger, Inc. There has been no attempt by Defendant William M. Mercer of Ky., Inc's. Victor Romanov to substantiate and resolve the inconsistencies in his affidavit by making a

good faith effort to inform Plaintiff of her pension assets disposition in the acquired companies, their plan numbers, terminations or continuing existence. The repeated 'cat and mouse' game to deny Plaintiff knowledge of her pension assets is highly inappropriate and violates ERISA.

Plaintiff has never alleged that the only plans at issue in this matter are MMC plans in their obscurely designated 001 and 003 numbers. The plans at issue in this case are marital pension and employee benefit plans recognized as marital assets by ERISA, requiring disclosure of assets, in order to equitably divide under QDRO orders if divorce occurs. Her interest in any plans was not only by virtue of her divorce but an ongoing interest in any plans from 1961 when assets were deposited for her benefit along with the co-beneficial interest of her former husband. These benefits were to be the fiduciary responsibility of Defendant William M. Mercer of Ky., Inc., in it's various names, along with the remaining defendants in this case. They have violated their responsibilities and Plaintiff has been denied her rights to information of her marital ERISA qualified assets.

For the above stated reasons, Plaintiff urges the Court to reconsider the dismissal of William M. Mercer of Ky., Inc.

Respectfully submitted,

/s/ Lorena Fay Overfield

Lorena Fay Overfield
1236 West 62nd Street
Kansas City, Missouri 64113
816-822-1349

Plaintiff pro se

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

LORENA FAY OVERFIELD, Plaintiff,	)	
v.	)	Case No. 94-0991-CV-W-1
FRANCIS N. BONSIGNORE, et al.	)	
Defendants.	)	

MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT

(Filed Nov. 2, 1995)

Comes now Plaintiff Lorena Fay Overfield to move for a reconsideration of Summary Judgment granted to Defendants pursuant to their motion. Plaintiff has in her possession additional information relevant to the employer identification numbers and employee benefit plans in the affiliates of Marsh and McLennan Companies which have not been disclosed to her by Defendants to date.

The documents listed include but are not limited to these omissions as follows:

Form 5500 with attachment Form 851 – Affiliations Schedule (1987, filed September 1988) Marsh and McLennan Cos.,Inc.

Two Form 5500 for Retirement Plan – No. 001 (1987, filed September 1988) Marsh and McLennan Cos., Inc.

Form 1-A – Regulation A Offering Circular Part II (January 9, 1984 Meidinger, Inc.

ERISA Document Transcription Form – Savings and Profit Sharing Marsh and McLennan Companies, Inc. – No. 003

ERISA Document Transcription Form – Profit Sharing Plan Marsh and McLennan Cos., Inc. – No. 001

Form 5500 – The Putnam Companies, Inc. – Profit Sharing Plan – No. 001 – signed by Francis N. Bonsignore, Plan Administrator, Marsh and McLennan Cos., Inc. (1989 filed on September 17, 1990)

The attachments partially demonstrate the number of plans and employer names and identification numbers, hampering the identification of each plan, plan sponsor, whether active or terminated which further substantiates Plaintiff's allegation of lack of disclosure by Defendants and dismissed Defendant William M. Mercer of Ky., Inc. The documents in their entirety are available to the Court if requested.

For the foregoing reasons, the Plaintiff respectfully requests a reconsideration of the Summary Judgment granting Defendants' motion.

Respectfully submitted,

/s/ Lorena Fay Overfield
Lorena Fay Overfield
1236 West 62nd Street
Kansas City, Missouri 64113

Plaintiff pro se

MOTION FOR RECONSIDERATION OF DISMISSAL

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LORENA FAY OVERFIELD, Plaintiff, v. FRANCIS N. BONSIGNORE, et al. Defendants.	)	Case No. 94-0991-CV-W-1

MOTION FOR RECONSIDERATION OF DISMISSAL OF DEFENDANT WILLIAM M. MERCER OF KY., INC.

(Filed Nov. 1, 1995)

Comes now Plaintiff Lorena Fay Overfield and moves for a reconsideration of the dismissal of William M. Mercer of Ky., Inc. as Defendant based upon inaccurate affidavit signed by Mr. Victor Romanov, Associate Corporate Counsel of Marsh and McLennan Companies, Inc. which stated that the Kentucky corporation has existed solely for the purpose of maintaining insurance brokerage and insurance agency licenses and that it has never had employees. This is refuted by the Secretary of State of Kentucky annual report filed July 7, 1995.

Additional information was acquired by Plaintiff since the dismissal of Defendant William M. Mercer of Ky., Inc. which confirms that there were and are many affiliates of Marsh and McLennan Companies, Inc., with different employer identification numbers in the accompanying attachments listed in the sixteen page 1987 Form

851 Affiliate Schedule attached to the 1988 filing for 1987 of the IRS 5500 signed by the Plan Administrator of Marsh and McLennan Companies. This document verifies 1987 multiple names of affiliates in Louisville, Kentucky at the former offices of Meidinger, Inc., which was merged into affiliate of Marsh and McLennan Companies, Inc. in 1984.

Employees listed in the Secretary of State Annual Reports in July, 1995, of William M. Mercer of Ky., Inc. are employees of the former Meidinger, Inc., and their offices are at the same address. Plan sponsorship of these affiliates are likely to have remained in the former acquired companies as per their various employee identification numbers.

For the above stated reasons with supporting documents as attached, Plaintiff respectfully requests that a reconsideration be given to the dismissal of William M. Mercer of Ky., Inc. and that they be reinstated as a Defendant.

Respectfully submitted,

/s/ Lorena Fay Overfield
Lorena Fay Overfield
1236 West 62nd Street
Kansas City, Missouri 64113

Plaintiff pro se